IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 481 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRABHATBHAI RAMABHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 481 of 1999

MRS SHILPA J UNWALLA for Appellant

MR UR BHATT, ADDL.PUBLIC PROSECUTOR for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 12/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated May 15, 1999, rendered by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.4 of 1999, by which the appellant is convicted of the offences punishable under Sections 302, 323, 325 of the Indian Penal Code and Section 135 of the Bombay Police Act and sentenced to suffer R.I. for life and fine of Rs.1000/-, in default, R.I. for one year, for commission of offence punishable under Section 302 I.P.C. No separate sentence is imposed by the learned Judge on the appellant for commission of offences punishable under Sections 323, 325 I.P.C. and Section 135 of the Bombay Police Act. It is also directed by the learned Judge of the trial Court that an amount of Rs.700/- be paid to the wife of the deceased, if fine is paid by the appellant, and the appellant would be entitled to the benefit of set off.

2. Deceased Ranchhodbhai was resident of village Bhamaria, Taluka : Halol, District : Panchmahals. Name of his wife is Zaverben. He had two sons i.e. Raman and Chhatrasinh. He had also four brothers. The appellant is son of his one of the brothers, namely, Ramabhai. The mother of the deceased was residing with the deceased and not with any of the brothers of the deceased. The mother of the deceased had given a field known as Tankivala to the deceased which was being cultivated by him. His other brothers were claiming share in the said field. However, the field was not partitioned, nor any share was given to the brothers of the deceased and the deceased had continued to cultivate the same. As a result of this, the appellant, who is son of brother of the deceased was agitated. It may be stated that the deceased and his wife Zaverben were residing with his son Chhatrasinh and wife of Chhatrasinh. The incident in question had taken place on September 3, 1998. On that day, Chhatrasinh, who is son of the deceased, in the company of his wife, had gone to village Ramban where his maternal uncle was residing. At about 9.00 P.M. on the day of incident, the deceased and his wife Zaverben were sitting in courtyard. At that time, the appellant had come from behind and delivered a stick blow on the head of the deceased. It was also the case of the prosecution that the appellant was accompanied by two other accused, namely, Chimanbhai Ramabhai Parmar and Pratapbhai Ramabhai Parmar, who were his real brothers and that they had also assaulted the deceased. Zaverben, who is wife

of the deceased, had made an attempt to intervene in the incident to save her husband from further injury, but accused Prabhat Rama had delivered a stick blow on her waist. Ganpat Mansing and Sardar Khatu, who were returning to village Bhamaria from Halol at the time of incident, had witnessed the incident and intervened. The claim of Zaverben is that she was asked by Ganpat Mansing and Sardar Khatu to sit with the deceased, as they were to make some arrangements for removing the deceased to a dispensary; whereas the claim of Ganpat Parmar is that he had asked Zaverben to remove the deceased to a hospital for treatment. However, the fact remains that the deceased was not removed to hospital for a pretty long time. In the morning of September 4, 1998, Chhatrasinh had returned home and found that his father was lying on a cot. On inquiry by him, Zaverben had told him that the appellant and two other accused, namely, Chiman and Pratap had assaulted the deceased and her. Thereupon, Chhatrasinh had lodged First Information Report at Halol Police Station, which was registered by Jagubhai Haribhai, who was then P.S.O. of the Police Station. After registering offences against the accused, the complaint lodged by Chhatrasinh was handed over to Sonabhai Punjabhai who was then Jamadar of Halol Police Station for investigation. The jamadar had drawn panchnama of place of occurrence and recorded statements of Zaverben Ranchhodbhai, Sardar Khatu, Ganpat Mansing etc. The weapon of offence viz. stick, which was used in commission of crime, was produced by the accused and the same was seized during the course of investigation. Meanwhile, the deceased was referred to Halol Referal Hospital for treatment at about 10.00 A.M. with a police yadi. Dr.Bhagvatsing Punamchand Itare, who was then Medical Officer, Referral Hospital, Halol, had examined the deceased. It was found by him that the deceased was unconscious and had swelling on parietal region and his pupils were dilated. He had, therefore, issued a certificate indicating the condition of the deceased when the deceased was brought before him for treatment and referred the deceased to S.S.G.Hospital, Baroda for further treatment. Accordingly, the deceased was removed to S.S.G.Hospital, Baroda for treatment. During the course of treatment, the deceased succumbed to his injuries on September 6, 1998. Therefore, offence punishable under Section 302 read with Section 114 I.P.C. was registered against the appellant and two other accused. The investigation of murder of the deceased was thereafter taken over by Mr.B.C.Bhandari, who was then Senior Police Sub Inspector of Halol Police Station. He had deputed P.S.I. Mr.G.S.Pavar to hold inquest on dead body of the deceased, and accordingly, inquest on dead

body of deceased was held by Mr.Pavar in presence of panch witnesses. Mr.Bhandari had recorded statements of Zaverben Ranchhodbhai, Ushaben who is wife of Chhatrasinh, Jamabhai, Bhaijibhai, complainant etc. Zaverben had also sustained injury. Therefore, she was also referred to Medical Officer of Referal Hospital with a yadi. The investigating officer had also got prepared map of place of incident. After obtaining postmortem notes and on conclusion of investigation, the appellant and two others were chargesheeted of the offences punishable under Sections 302, 323, 325 read with Section 114 I.P.C. and Section 135 of the Bombay Police Act in the Court of learned Judicial Magistrate, First Class, Halol. As the offence punishable under Section 302 I.P.C. is exclusively triable by a Court of Sessions, case against the appellant and two others was committed for trial to Sessions Court, Panchmahals where it was numbered as Sessions Case No.4 of 1999.

3. The learned Additional Sessions Judge, Panchmahals at Godhra, to whom the case was made over for trial, framed charge against the appellant and two others at Exh.5 of the offences punishable under Sections 302, 323, 325, 504 r.w.sec.114 I.P.C. and Section 135 of the Bombay Police Act. The charge was read over and explained to the appellant and two others, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr.Kishor Pramodrai Desai as PW.1 at Exh.10, (2) Chhatrasinh Ranchhodbhai as PW.2 at Exh.14, (3) Bai Zaverben Ranchhodbhai as PW.3 at Exh.16, (4) Ganpatsinh Mansing Parmar as PW.4 at Exh.19, (5) Keshavbhai Maganbhai as PW.5 at Exh.20, (6) Shankerbhai Somabhai as PW.6 at Exh.21, (7) Dr.Bhagvatsing Punamchand Itare as PW.7 at Exh.23, (8) Sonabhai Pujabhai as PW.8 at Exh.28, (9) Bharatkumar Chimanlal Bhandari as PW.9 at Exh.33, to prove its case against the appellant and two others. The prosecution also produced documentary evidence such as postmortem notes of deceased Ranchhodbhai at Exh.11, First Information Report lodged by Chhatrasinh at Exh.15, panchnama of place of occurrence at Exh.17, inquest panchnama at Exh.18, certificate of injury sustained by deceased Ranchhodbhai at Exh.24, certificate of injury sustained by Zaverben at Exh.25, arrest panchnama of the appellant at Exh.29, telephone worthy at Exh.30, death certificate of Sardar Khatubhai, who was one of the eye witnesses to point out to the Court that the prosecution was not able to examine him as one of the witnesses because he was dead at Exh.32, entry from diary maintained at the police station at Exh.34, notification issued by competent authority under Section 37(1) of the

Bombay Police Act at Exh.35, map of place of incident at Exh.37 etc. in support of its case against the appellant and two others.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant and others the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required under Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the case of the accused was that of general denial. However, the appellant in his further statement claimed that a false case was filed against him. Neither the appellant nor any of the two accused had entered into witness-box, nor examined any witness to prove that a false case was filed against them.

5. On appreciation of evidence adduced by the prosecution, it was held by the learned Judge that it was proved by the prosecution beyond reasonable doubt that deceased Ranchhodbhai had died a homicidal death. According to the learned Judge, testimony of Zaverben, who was wife of the deceased as well as testimony of eye witness Ganpatsinh Mansing Parmar was trustworthy as well as cogent and it was proved by the prosecution that the appellant had delivered blow on head of the deceased by means of a stick. According to the learned Judge, the appellant had also caused fracture of left parietal bone of the deceased and had caused grievous hurt to him, as a result of which, commission of offence punishable under Section 325 I.P.C., by him was established. What was held by the learned Judge was that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause his death and, therefore, the appellant was liable to be convicted of the offences punishable under Sections 302, 325 I.P.C. According to the learned Judge, no reliable evidence could be adduced by the prosecution to establish that original accused No.2 i.e. Chimanbhai Ramabhai Parmar and original accused No.3 i.e. Pratapbhai Ramabhai Parmar had caused injuries to Zaverben by kick and fist blows, nor could it be established by the prosecution that they had caused any injury to deceased Ranchhodbhai, nor it could be proved by the prosecution that they had intentionally insulted the deceased or any one else with intent to provoke breach of piece and, therefore, they were entitled to be acquitted. It was found by the learned Judge that the appellant had committed breach of notification issued under Section 37(1) of the Bombay Police Act and, therefore, he was liable to be convicted of the offence

punishable under section 135 of the Bombay Police Act. According to the learned Judge, commission of offence punishable under Section 323 I.P.C. by the appellant was also established by the prosecution. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Sections 302, 323, 325 I.P.C. as well as Section 135 of the Bombay Police Act and imposed sentences referred to earlier and acquitted two other accused by judgment dated May 15, 1999, giving rise to instant appeal. It may be stated that acquittal of the original accused Nos.2 & 3 in Sessions Case No.4 of 1999 is not subject matter of challenge in any acquittal appeal.

6. Ms.Shilpa Unwala, learned counsel of the appellant, contended that in the complaint lodged by Chhatrasinh pursuant to information given by Zaverben it is stated that Zaverben had received injuries on her waist, whereas evidence of Dr.Itare shows that she was complaining of pain in wrist, which indicates that Zaverben was not present at the time when the incident had taken place and, therefore, conviction of the appellant as recorded by the learned Judge of the trial Court should be set aside. According to the learned counsel of the appellant, evidence does not show that Zaverben had sought help of others and as motive, which is alleged by the prosecution, is not proved beyond reasonable doubt because other close relatives of the deceased had also share in the land, judgment impugned in the appeal should be quashed. What was maintained by the learned counsel of the appellant was that according to Zaverben the appellant had delivered a blow with a stick on the head of the deceased without saying anything, and her testimony does not establish that any altercation had taken place between the deceased and the appellant, which story is not probable, and as genesis of the incident is suppressed by the prosecution, the appeal should be accepted. It was also pointed out that the case of Zaverben that there was blood on the spot stands falsified by contents of panchnama of place of occurrence and, therefore, it would not be proper to place reliance on her testimony for convicting the appellant under Section 302 I.P.C. more particularly when no independent witnesses have been examined by the prosecution. It was argued that no incriminating articles such as clothes of the deceased, clothes of the appellant and other accused, control earth etc.were seized during the course of investigation, nor were they sent to Forensic Science Laboratory ("F.S.L." for short) for analysis and, therefore, it would be hazardous to hold that incident, as suggested, had taken place. It was asserted that the

manner in which the incident had taken place as narrated by two so-called eye witnesses is different which makes the case of the prosecution doubtful and, therefore, appeal should be allowed. It was argued that in all probability Zaverben had learnt about assault on the deceased after the incident was over and that the appellant and two others were involved in the case on mere suspicion and, therefore, judgment impugned in the appeal should be set aside. In the alternative, it was argued that only one blow with stick was given by the appellant on the head of the deceased without any intention to cause his death and, therefore, conviction of the appellant under Section 302 I.P.C. should be converted into one punishable under Section 304 Part-II I.P.C. and sentence already undergone by him, by this time, should be imposed on him for commission of the said offence.

7. Mr.U.R.Bhatt, learned A.P.P., contended that Zaverben, who is a rustic lady and who is wife of the deceased, would never allow the real culprit to go scot free, or involve the appellant falsely in the case and, therefore, after accepting her testimony, well-founded conviction of the appellant should be upheld by this Court. According to the learned A.P.P., testimony of Zaverben stands corroborated in material particulars by reliable testimony of eye witness Ganpatsih as well as complaint of Chhatrasinh which was filed pursuant to information given by Zaverben and, therefore, the trial Court was justified in acting upon her testimony while convicting the appellant under Section 302 I.P.C. What was maintained by the learned A.P.P. before the Court was that minor discrepancies appearing in the testimony of Zaverben are due to power of observation and her age as well as lapse of time after which her testimony was recorded, but those minor discrepancies do not go to suggest that she was not present at the time of incident or had not witnessed the incident and, therefore, comments offered by the learned counsel of the appellant on the testimony of Zaverben should not be accepted by the Court. It was argued that Zaverben being wife of the deceased would not allow the real culprit to go scot free or would involve any one falsely in such a serious case and, therefore, her claim that the appellant was present, who had delivered fatal blow on the head of her husband should be accepted by the Court. According to the learned A.P.P., testimony of eye witness Ganpatsinh Mansing Parmar also establishes that the appellant had delivered stick blow on the head of the deceased and, therefore, no error was committed by the learned Judge of the trial Court in placing reliance on his evidence while

convicting the appellant under Section 302 I.P.C. etc. The learned counsel argued that defects in investigation such as absence of seizure of incriminating articles or failure on the part of the investigating agency to send incriminating articles to F.S.L. for analysis does not affect at all the sworn reliable testimony of Zaverben and eye witness Ganpatsinh, who have unfolded the prosecution case to the fullest extent and, therefore, the appellant is not entitled to have any benefit merely because there were some defects in investigation. According to the learned A.P.P., evidence on record has been appreciated by the learned Judge of the trial Court in its proper perspective and the appeal which lacks merits should be dismissed. Dealing with the alternative plea advanced by the learned counsel of the appellant, it was argued by the learned A.P.P. that the appellant had delivered one blow with stick on the head of the deceased with great force which had caused fracture of left parietal bone and as the evidence adduced by the prosecution establishes that the injury caused by the appellant was sufficient in the ordinary course of nature to cause death of the deceased, well-founded conviction of the appellant under Section 302 I.P.C. should be upheld by this Court.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. The fact that the deceased had died a homicidal death can hardly be disputed. The testimony of Dr.Bhagvatsing Itare, who was then Medical Officer of Halol Referal Hospital, shows that when he had examined the deceased on September 4, 1998, he had found that the deceased was unconscious and had swelling on left side of parietal region, whereas his pupil was dilated and in view of serious injury sustained by the deceased, he had referred the deceased to S.S.G.Hospital, Baroda for further treatment. The testimony of Dr.K.P.Desai recorded at Exh.10 shows that he had received dead body of the deceased on September 6, 1998 for postmortem examination. According to him, autopsy on dead body of the deceased was performed by a panel of doctors comprising himself and Dr.S.Basu. His testimony shows that on examination of dead body of the deceased, following injuries were noticed :-

(1) Tracheostomy wound in the midline position in the lower part of the neck in front.
(2) 6 cms.long sutured wound over the (L) parietal region 7 cms.above left ear parallel to the sagittal suture.

(3) 7 cms. long surgical sutured wound over the parietal region, 8 cms. above the Rt.ear parallel to the sagittal suture.

The internal injuries, which were found, have also been enumerated by him in his substantive evidence recorded before the Court. According to the Doctor, death of the deceased was due to cranio cerebral damage following trauma. According to the Doctor, haematoma over below the vault of skull was also found. The cross-examination of the Doctor and the eye witnesses examined by the prosecution would indicate that absurd suggestions were made by the defence that a tree had fallen on the deceased and, therefore, the deceased had sustained injuries, or that the deceased was hanging upside-down on a tree and had sustained injuries because he had fallen down or that he had received injuries in an accident because he was sitting outside his house which was just abutting on the road. These useless and substanceless suggestions have been rightly denied by the Doctor and others. The testimony of Zaverben and that of eye witness Ganpatsinh shows that the deceased had received injuries because he was assaulted with a stick. The injuries sustained by the deceased are also mentioned in inquest panchnama which is produced on the record of the case at Exh.18. Having regard to the totality of the facts as emerging from the record, there is no manner of doubt that the deceased had died a homicidal death. The finding recorded by the learned Judge that it is proved by the prosecution that the deceased had died a homicidal death is eminently just and is hereby upheld.

9. In order to bring home the guilt of the appellant, the prosecution has examined two eye witnesses, namely, Zaverben Ranchhodbhai at Exh.16 and Ganpatsinh Parmar at Exh.19. The testimony of Zaverben shows that at the time of incident she was residing at village Bhamaria with her family. According to her, on the day of incident, his son Chhatrasinh and his wife had gone to village Ramban at the house of his maternal uncle and that after taking supper, she was sitting in courtyard with her husband between 8.00 P.M. and 9 P.M. According to her, at that time the appellant had come from behind and delivered a blow with stick on the head of the deceased, whereas original accused No.2 i.e. Chiman Rama had delivered stick blow on back of her husband and original accused No.3 i.e. Pratap Rama had caused injury on her waist by delivering a stick blow. What is maintained by the witness is that at that time Sardar Khatu and Ganpat Mansing had come and they had also witnessed the incident. According to her, Sardar

Khatu and Ganpat Mansing had asked her to sit with her injured husband, and informed her that they were returning after going to Shivrajpura. Her testimony further shows that her son had returned to her house at about 8.00 A.M. on September 4, 1998 and as he had found that the deceased was lying on a cot, he had made inquiry as to what had happened to deceased. What is stated by the witness before the Court is that thereupon she had informed her son Chhatrasinh that the appellant had caused injury to him and run away. According to her, her son had removed the deceased to Halol hospital from-where deceased was taken to Baroda hospital and the deceased had expired on the 4th day of his admission into the hospital. According to her, the appellant and other accused were desirous of getting land of her mother-in-law and, therefore, the deceased was assaulted. She had also informed the Court that she herself was injured and, therefore, she had gone to hospital for treatment.

In her cross-examination, it was stated by her that age of her husband was about 80 years and her age was also about the same. The suggestion made to the witness by the defence that because of her age she was not able to see properly was emphatically denied by her. It was put to the witness that when the appellant and two acquitted accused were beating her husband, she had not made any attempt to snatch the stick, and this suggestion was accepted by the witness to be true. The suggestion made by the defence that because of injury, a pool of blood had collected at the place of incident was also accepted by her. According to her, Sardar Khatu and Ganpat Mansing had arrived at the place of incident when her husband was actually being beaten by the appellant and others. The suggestion made by the defence that there was darkness at the place where the incident had occurred was denied by her. According to her, Sardar Khatu and Ganpat Mansing had gone to lodge F.I.R. It was also admitted by her that her son and her daughter-in-law were staying separate in the same village. After admitting that the appellant and two other acquitted accused were sons of elder brother of her husband, it was denied by her that a false statement was made by her before police and that she was deposing false facts before the Court. In cross-examination by the learned counsel of the acquitted accused, the witness had admitted that a dispensary was available in her village. However, the suggestion made by the defence that her husband had a habit of having a walk after taking supper was denied by her. It was also admitted by her that she had not stated in her police statement that the acquitted

accused were beating her deceased husband with sticks. The suggestion made by the defence that the deceased was talking at the time when Ganpat Mansing and Sardar Khatu had left the deceased to her care was not accepted by the witness. It was also denied by her that people of the village had collected at the place of incident when the incident was going on. It was admitted by her that she had not raised shouts when her husband was assaulted. According to her, she was not knowing survey number of the field regarding which dispute was going on between the appellant and her deceased husband, but it was stated by her that the field was not partitioned and it was being cultivated by her husband. After admitting that the road is situated at a distance of 10 ft. from her house, the suggestion made by the defence that the deceased was knocked down by a vehicle was emphatically denied by her. Further, the suggestion made by the defence that she had taken the deceased to hospital was denied by her and it was maintained by her that she had even not gone to S.S.G.Hospital where her husband was admitted for treatment. After admitting that her police statements were recorded twice, the suggestion made by the defence that she had not stated in her first police statement that she had received injury on her waist was denied by her. The suggestion made by the defence that in order to deprive the accused of their share in the field she was deposing falsely was also emphatically denied by her. This is all what transpires from the testimony of Zaverben.

10. Reassessment of evidence of Zaverben makes it clear that she was with the deceased at the time when the incident had taken place. Normally, old couple loves to be in company of each other and, therefore, her claim that she was sitting with her husband in courtyard after taking supper inspires confidence of the Court. The claim of this old lady was that she had also sustained injury in the incident. However, it is to be noted that the incident in question had taken place on September 3, 1998, but she was referred to Doctor with police yadi on September 7, 1998 only when the deceased had succumbed to his injuries at S.S.G.Hospital on September 6, 1998. Naturally, therefore, there would not be traces of injury on waist of the witness caused by a stick. However before Doctor she had complained of pain and tenderness on right shoulder, which is quite evident from the certificate of injury issued by Medical Officer, Community Health Centre, Halol, which is produced at Exh.25 on the record of the case. The old lady has testified before the Court in a straight manner. There are no major noticeable contradictions or omissions in

her testimony. Her case that the appellant was the person who had inflicted stick blow on the head of the deceased, therefore, deserves acceptance. Her testimony also gets corroboration from the testimony of her son i.e.Chhatrasinh who is examined at Exh.14. Chhatrasinh in his evidence before the Court had stated that on the day of incident he had gone to the house of his maternal uncle and had returned to his house situated at village Bhamaria on the next day. According to him, he had found that his father was lying on a cot and, therefore, he had made inquiry with her mother as to what had happened. What is maintained by the witness before the Court is that thereupon his mother had informed him that the appellant and two acquitted accused had assaulted his father. The testimony of witness Chhatrasinh further shows that thereupon he had gone to police station and lodged F.I.R. All these relevant facts are also stated in his F.I.R. which he had filed promptly after learning about the incident from his mother. Thus, the reliable testimony of Zaverben, who is wife of the deceased, gets ample corroboration from the testimony of Chhatrasinh.

11. The prosecution has also examined Ganpatsinh Mansing Parmar,who had also witnessed the incident, at Exh.19. His testimony would show that on the day of incident he in the company of Sardar Khatu had gone to Halol and had witnessed the incident while returning to his house. According to him, near the house of Ranchhodbhai a quarrel had taken place and, therefore, he had stopped his motorcycle. What is maintained by the witness before the Court is that he had seen that the appellant had delivered a stick blow on the head of the deceased. The witness claimed before the Court that he had asked the wife of Ranchhodbhai to take Ranchhodbhai to hospital and thereafter had gone to his house. It was also mentioned by him that at the time of incident, acquitted accused were also present, but were standing near their house.

In his cross-examination, the witness has pleaded ignorance about the particulars of land of the deceased and of the accused. It was admitted by him that at the place of incident, there was darkness and that people had collected near the place of incident, but the suggestion made by the defence that he had reached the place of incident after the incident was over was emphatically denied by him. What was maintained by the witness in his cross-examination was that after he had reached the place of incident in the company of Sardar Khatu, the deceased was injured as a result of which he had fallen down on ground. Though it was admitted by the witness that at

the time when the incident had taken place, they were on road, the suggestion made by the defence that they were at a distance of 20 ft. from the place of incident was denied by him. The suggestion made by the defence that those, who had collected near house of the deceased, were trying to rescue the deceased was also denied by the witness. Further, the suggestion made by the defence that he had gone straight to his house from Halol was also denied by him. According to him, nobody had asked him to remove the deceased to hospital. The suggestion of the defence that he had tried to know the reason as to why the incident had taken place from the members of public who had collected at the place of incident was also denied by him. However, it was admitted by him that the acquitted accused were standing near their house and had not participated in the incident.

A fair reading of the testimony of this witness shows that he had ample opportunity of witnessing the incident. As narrated by him, he was returning from Halol on his motorcycle with Sardar Khatu. It may be stated that Sardar Khatu could not be examined by the prosecution because he expired on February 24, 1998. Zaverben, who is wife of the deceased, has referred to presence of this witness at the place of incident. The record does not show that Ganpatsinh Parmar was on inimical terms with the appellant or acquitted accused. Therefore, he had no reason whatsoever to implicate the appellant falsely in such a serious case. The testimony of this witness does not suffer from major contradictions and/or omissions with reference to his earlier statements recorded during the course of investigation. The learned Judge of the trial Court, who had advantage of observing demeanour of the witness, has believed testimony of this witness. The plea that witness Ganpatsinh was a chance witness cannot be accepted. The witness was returning to his own house situated in village Bhamaria. While returning, he had found that a quarrel was going on near the house of the deceased and, therefore, he must have stopped near the house of the deceased out of curiosity and anxiety. The claim made by the witness that he had witnessed the incident in question cannot be brushed aside because not only there are no major contradictions and/or omissions in his testimony, but name of this witness is indicated in the complaint itself as well as by Zaberben who is wife of the deceased. The testimony of this witness lends complete corroboration to the testimony of Zaverben examined at Exh.16. Thus, finding recorded by the learned Judge of the trial Court that it is proved by the prosecution beyond reasonable doubt that the appellant had caused injury on the head of the

deceased by inflicting a stick blow is found to be eminently just and no case is made out by the learned counsel of the appellant to interfere with the same in instant appeal.

12. The plea based on defects in investigation cannot be accepted. Merely because incriminating articles were not seized during the course of investigation or were not despatched to F.S.L. for analysis, would not discredit eye witness account given by witness Zaverben and witness Ganpatsinh. Witness Zaverben and witness Ganpatsinh cannot be branded as liers merely because some lapses have been committed by the investigating officer. Therefore, plea based on defects in investigation cannot be accepted more particularly when the prosecution case is unfolded through reliable and cogent testimony of Zaverben and Ganpatsinh.

13. This brings the Court to consideration of the question as to which offence is committed by the appellant. According to the learned A.P.P. the appellant had delivered a stick blow on vital part of body of the deceased with such a great force that it had caused fracture of left parietal bone and as totality of the evidence adduced by the prosecution establishes that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause his death, conviction of the appellant under Section 302 I.P.C. should be upheld by this Court; whereas the learned counsel of the appellant has contended that the appellant had delivered only one blow on the head of the deceased with a stick and as the record does not establish satisfactorily that the injury caused to the deceased was sufficient in the ordinary course of nature to cause his death, conviction of the appellant under Section 302 I.P.C. should be converted into one punishable under Section 304 Part-II I.P.C. On reconsideration of evidence on record, this Court finds that Dr.K.P.Desai, who had performed autopsy on the dead body of the deceased, has not stated in his testimony that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause his death. As admitted by witness Ganpatsinh, there was darkness where the incident had taken place. Therefore, it is difficult to hold that the intention of the appellant was to cause injury on the head of the deceased. The testimony of Ganpatsinh further shows that a quarrel was going on near the house of the deceased. However, nature of quarrel is neither specified by him or by Zaverben, who is wife of the deceased. It is well to remember that as per witness Ganpatsinh, two acquitted accused were standing near

their house and had not participated in the incident. Therefore, there is every reason to believe that in a spur of moment the appellant had delivered one stick blow to the deceased which had fallen on his head. Further, the evidence on record establishes that no attempt was made by Zaverben to remove the deceased to any hospital for treatment for pretty long time. The evidence of Dr.Itare establishes that though he had found the deceased unconscious on September 4, 1998, the deceased had not died and, therefore, he had referred the deceased to S.S.G.Hospital, Baroda for further treatment. What would have been physical condition of the deceased if he had been removed to hospital within reasonable time for treatment, is not stated by any of the two Doctors examined by the prosecution. The evidence does not disclose that the appellant had any cutting weapon with him. Having regard to the totality of the facts and circumstances as emerging from the record of the case, it is difficult to hold that injury inflicted by the appellant by stick can be said to be with sole intention to cause death of the deceased. However, there is no manner of doubt that the appellant had inflicted stick blow on the head of the deceased with the knowledge that it was likely to cause his death or he had knowledge that giving of blow with stick on head of the deceased would cause such bodily injury as was likely to cause his death. Under the circumstances, this Court is of the firm opinion that the case would be covered by the provisions of Section 304 Part-II I.P.C. The conviction of the appellant under Section 302 I.P.C. is, therefore, liable to be converted into one punishable under Section 304 Part-II I.P.C.

This Court has heard the learned counsels of the parties with regard to punishment to be imposed on the appellant for commission of offence punishable under Section 304 Part-II I.P.C. The learned A.P.P. has produced xerox copy of jail remarks-sheet of the appellant which was received by him through Fax. It indicates that with remission the appellant has undergone sentence of five years, seven months and twelve days. Having regard to the facts of the case, this Court is of the opinion that interest of justice would be served if the appellant is ordered to suffer imprisonment which he has already undergone by this time.

14. This Court finds that the learned Judge has convicted the appellant under Section 325 I.P.C. for causing fracture to the deceased. When the appellant was convicted under Section 302 for causing injury to the deceased, he could not have been convicted under Section

325 I.P.C. for causing the same injury. Therefore, conviction of the appellant under Section 325 I.P.C. is liable to be set aside. Further, this Court has scrutinised judgment impugned in the appeal closely with the assistance of learned advocates of the parties, but it is difficult to uphold the conviction of the appellant under Section 323 I.P.C. The learned Judge has not specified in the impugned judgment as to why the appellant is convicted under Section 323 I.P.C. and for causing injury to whom because the case of Zaverben was that injury to her was caused by original accused No.3 i.e. Pratapbhai Ramabhai. Thus, conviction of the appellant under Section 323 I.P.C. is also liable to be set aside. The conviction of the appellant under Section 135 of the Bombay Police Act is not challenged by the learned counsel of the appellant and even otherwise, is found to be just and proper. Thus, the appellant will have to be convicted under Section 304 Part-II I.P.C. and Section 135 of the Bombay Police Act.

For the foregoing reasons, the appeal is partly allowed. Judgment dated May 15, 1999, rendered by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.4 of 1999, by which the appellant is convicted of the offences punishable under Sections 302, 323, 325 I.P.C. and sentenced to suffer R.I. for life and fine of Rs.1000/-, in default, R.I.for one year for commission of offence punishable under Section 302 I.P.C., is hereby set aside. Instead, the appellant is convicted of the offence punishable under Section 304 Part-II I.P.C. The appellant is sentenced to suffer R.I. for five years, seven months and twelve days for commission of offence punishable under Section 304 Part-II I.P.C. The conviction of the appellant under Section 135 of the Bombay Police Act is hereby confirmed, but no separate sentence is passed for commission of offence punishable under Section 135 of the Bombay Police Act. This Court is informed by the learned counsels of the parties that the appellant is on bail pursuant to order passed by Division Bench of this Court on March 19, 2004 in Criminal Misc. Application No.1831 of 2004. As the appellant has already undergone the punishment imposed on him for commission of offence punishable under Section 304 Part-II I.P.C., it is not necessary for him to surrender to the authorities again. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(J.R.Vora,J.)

(patel)